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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RUTH HABERERN,

Petitioner,

— *v.* —

KAUPP VASCULAR SURGEONS, LTD. DEFINED BENEFIT PENSION PLAN AND TRUST AGREEMENT, LEHIGH VALLEY VASCULAR SURGEONS, LTD. RETIREMENT PLAN, LEHIGH VALLEY VASCULAR SURGEONS, LTD. and KENNETH M. McDONALD, TRUSTEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do fiduciary obligations attach within the meaning of ERISA § 3 (21)(A), 29 U.S.C. § 1002 (21)(A), when an employer, who also serves as a pension plan administrator, sponsor, and trustee, fraudulently induces an employee to participate in the pension plan and misleads the employee as to the plan's terms?

2. Does ERISA § 510 permit discriminatory pension plan amendments?

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Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan and Trust Agreement, 151 F.R.D. 49 (E.D. Pa. 1993) is reproduced in the Appendix, *infra* at pp. 74a-78a.

Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan and Trust Agreement, 822 F. Supp. 247 (E.D. Pa. 1993) is reproduced in the Appendix, *infra* at pp. 39a-73a.

Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan and Trust Agreement, 812 F. Supp. 1376 (E.D. Pa. 1992) is reproduced in the Appendix, *infra* at pp. 79a-92a.

JURISDICTION

Petitioner Ruth Haberern seeks review from a final judgment entered on May 25, 1994. On June 25, 1994, the United States Court of Appeals for the Third Circuit denied Mrs. Haberern's Petition for Rehearing. On September 22, 1994, Justice Souter signed an order extending the time within which to file a petition for a writ of certiorari to and including November 17, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED IN THE CASE

The pertinent text of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001, 1002, 1022, 1104, 1105, 1132, 1140 and 1144 is contained in the Appendix accompanying this Petition.

STATEMENT OF THE CASE

This case squarely presents the question whether ERISA's protections may be eviscerated in the name of employer sovereignty over at-will employees.

A. Nature of the Case

Ruth Haberern initiated this lawsuit against (a) two employee pension plans, (b) her employer who established, sponsored, and administered the plans, and (c) the plans' trustee to recover pension benefits and salary that were wrongfully withheld under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. After a three-day bench trial, the United States District Court for the Eastern District of Pennsylvania determined that Mrs. Haberern's rights under ERISA and the pension plans had been violated because the defendant pension fiduciaries (1) collectively misled Mrs. Haberern by informing her that participation in one of the pension plans was mandatory when in fact it was voluntary, thereby forcing her to participate in the plan against her will; (2) forced her to fund the plan when the plan document required the employer to fund the plan; (3) affirmatively misled Mrs. Haberern when they told her that she would receive a pension benefit equal to her salary when she retired; and (4) removed critical pages from the copy of the Summary Plan Description provided to Mrs. Haberern that would have disclosed her employer's contribution obligations and the voluntary nature of the plan. (App. 56a-57a). The District Court also determined that Mrs. Haberern's employer discriminatorily amended one of the plans by tripling the value of all other participants' life insurance benefits while totally eliminating Mrs. Haberern's because she was the only employee over 56. (App. 59a-60a).

Despite the uncontradicted record of fraud, trickery, and deceit related to Mrs. Haberern's pension, the United States Court of Appeals for the Third Circuit, relying on Pennsylvania's at-will employment doctrine, reversed the District Court's decision and held that ERISA offered no protection to Mrs. Haberern. (App. 8a-16a). The Court of Appeals also reversed the District Court's decision regarding

the discriminatory pension plan amendment by adopting the position that while ERISA prohibits discrimination interfering with pension rights, it does not prohibit discriminatory plan amendments. (App. 22a-26a).

B. Statement of Facts

1. Mrs. Haberern Begins Working for Lehigh Valley.

Ruth Haberern is a 72-year-old woman who, from 1974 to 1985, worked as a secretary-bookkeeper for a medical practice, Lehigh Valley Vascular Surgeons, Ltd. ("Lehigh Valley").[1] (App. 41a, 61a n.1).

To attract Mrs. Haberern to work for Lehigh Valley in 1974, Dr. Harry A. Kaupp, M.D., Lehigh Valley's sole shareholder, director, and officer at the time, offered Mrs. Haberern an annual salary of $11,500. (App. 41a). As an incentive, Kaupp offered to pay Mrs. Haberern, as part of her compensation, a percentage of the corporation's gross receipts, payable in an annual lump sum. (App. 41a). The more Lehigh Valley's gross receipts increased, so too would this part of Mrs. Haberern's salary. Mrs. Haberern's salary increased every year from 1975 to 1979. (App. 41a).

2. Lehigh Valley Establishes the Defined Contribution Pension Plan.

As an additional benefit, Lehigh Valley established a defined contribution pension plan, the Lehigh Valley Vascular Surgeons Ltd. Retirement Plan ("Defined Contribution Plan"[2]). Under the Defined Contribution Plan, Lehigh Valley made contributions to the plan each year on behalf of each participant. Mrs. Haberern participated in the plan from its effective date. (App. 42a).

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1. In 1984, the corporate name of Kaupp Vascular Surgeons, Ltd., which had been incorporated in 1973, was changed to Lehigh Valley Vascular Surgeons, Ltd. Throughout this Petition, Mrs. Haberern's employer will be referred to as "Lehigh Valley."

2. The Defined Contribution Plan, originally known as Kaupp Vascular Surgeons Ltd., Employee Pension Plan changed its name to Lehigh Valley Vascular Surgeons, Ltd. Retirement Plan.

3. Enter Dr. McDonald, the "Trustee."

On May 1, 1978, Dr. Kenneth McDonald, who had joined Lehigh Valley in 1976, became a trustee of the Defined Contribution Plan. (App. 40a). Dr. McDonald and Dr. Kaupp were Lehigh Valley's only shareholders from 1973 through November 1, 1984. (Kaupp Dep. Tr. at App. 133a).

4. Kaupp and McDonald Decide To Create a Defined Benefit Pension Plan.

In 1979, Kaupp and McDonald decided they wanted to shelter more of their income from taxes and began the process of establishing a second pension plan, a defined benefit pension plan.[3] (Lisicky Test. at App. 127a).

In March 1980, McDonald and Kaupp, the two shareholders of Lehigh Valley, established the Kaupp Vascular Surgeons, Ltd. Defined Benefit Plan and Trust Agreement ("Defined Benefit Plan"). (App. 43a-45a).

Throughout the Defined Benefit Plan document, constant reference was made to employer contributions; the Defined Benefit Plan document did not refer to employees contributing to fund the Defined Benefit Plan. Accordingly, the District Court found as fact that the Defined Benefit Plan required the employer to make the contributions to fund the pension benefits. (App. 56a).

5. The Doctors' "Problem": Ruth Haberern.

One problem remained, however, regarding the Defined Benefit Plan: Ruth Haberern.

Mrs. Haberern's presence actually created two problems for the doctors. First, because she was an older employee, higher annual contributions would be needed to fund her pension benefit; but the

3. A defined benefit plan differs from a defined contribution plan in that a person's benefit is based upon a formula taking into account factors such as age, compensation, and years of service. Thus, the employer guarantees a certain benefit based on a formula and benefits are paid out of a fund under the plan.

doctors did not want to make the required contribution. Because Ruth Haberern was older — she was 57 years of age at the time, which meant that she had a relatively short time before retiring — Lehigh Valley would have to contribute approximately $10,000 annually into the Defined Benefit Plan on behalf of Mrs. Haberern. (App. 44a).

The other problem was that for the Defined Benefit Plan to go into effect under the law, the doctors needed Ruth Haberern to participate in the Plan. The doctors' solution to these two problems was simple: as the District Court found, they cheated and lied to Mrs. Haberern.

The strategy of the plan's trustees and Lehigh Valley (the plan sponsor and administrator) regarding Mrs. Haberern's pension was this:

1. Create a Defined Benefit Plan which provided that the employer would make the full contributions under the Plan. (App. 56a).

2. Mislead Mrs. Haberern by telling her that she was required to join the Defined Benefit Plan — when, in reality — participation in the Defined Benefit Plan was voluntary. (App. 56a).

3. Mislead Mrs. Haberern by assuring her that she would receive a pension benefit equal to her salary upon retirement. (App. 45a).

4. Reduce Mrs. Haberern's salary from about $19,000 to approximately $14,500. (App. 44a, 57a-58a).

5. Use the money taken from Mrs. Haberern's salary to make the contribution to the Defined Benefit Plan to fund her pension benefit. (App. 44a, 57a).

As a result of the doctors' scheme and continuing conduct, Lehigh Valley diverted a sizeable portion of Mrs. Haberern's salary to the De-

fined Benefit Plan — thus enabling Lehigh Valley to reduce its contribution to only $5,500, rather than the $10,000 the Defined Benefit Plan required on behalf of Mrs. Haberern. (App. 44a).

John Lisicky, Lehigh Valley's accountant, testified at the trial that Mrs. Haberern's salary was slashed specifically to accommodate the Defined Benefit Plan. Regarding the doctors' scheme, Mr. Lisicky stated:

> They [the doctors] told her [Mrs. Haberern] that they were going to reduce her compensation, her salary from the $19,000 down to the $14,000 and then the amount going to the Defined Benefit Plan for her would have been reduced from approximately 10,000 to approximately $5,500. In essence, she was taking her salary and funding her plan.

(App. 130a).

Mrs. Haberern also testified that, in August 1980, she was told specifically that her accounts receivable percentage would be diverted to pay into the Defined Benefit Plan. (App. 124a). Mrs. Haberern's testimony on this point was never challenged at the trial.

To ensure the success of the trustees' scheme, Lehigh Valley (the plan sponsor and administrator) never informed Mrs. Haberern that the Defined Benefit Plan required the employer to make the contributions to the Plan. (App. 45a; Haberern Test. at App. 125a). The summary plan description[4] given to Mrs. Haberern was missing critical pages regarding contributions to the plan, insurance, and the table of contents. (App. 45a, 56a). One of the missing pages stated: "No contributions are required on your behalf. Rather, the Employer makes the full required contribution under the Plan."

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4. ERISA requires that pension plan recipients receive summary plan descriptions summarizing the terms of the plan. 29 U.S.C. § 1022(a)(1).

In August 1980, when the doctors told Mrs. Haberern that her compensation was being slashed by almost 25% so that they could enact the Defined Benefit Plan, Mrs. Haberern expressed her unhappiness. (App. 45a). Despite Mrs. Haberern's protests, the plan's trustees continued to tell Mrs. Haberern that she was required to join the Defined Benefit Pension Plan — when, in reality — participation in the Defined Benefit Plan was voluntary. (Riley Test. at App. 131-132a).

The fact that the two doctors — who were the Plan's trustees and the sole shareholders in Lehigh Valley, the Plan Administrator and sponsor — affirmatively misled Mrs. Haberern, despite her protests, was never contradicted at trial. And although trustee McDonald testified for several hours in his defense, he did not mention, let alone contradict, the fact that he had affirmatively misled Mrs. Haberern into participating in the Defined Benefit Plan.

Accordingly, the District Court found that McDonald and Lehigh Valley "did not give [Mrs. Haberern] a choice with respect to participating in the Defined Benefit Plan and never informed her that the employer, not the employee, was required to make the contributions to the Plan." (App. 56a). The District Court also concluded that the Plan sponsor and administrator, Lehigh Valley, breached its fiduciary duties and violated the terms of the Plan by eliminating a portion of Mrs. Haberern's compensation and using it to fund the Defined Benefit Plan, thereby forcing her to fund the Plan. (App. 70a; Conclusion of Law ¶ 12).

6. The Doctors Discriminatorily Eliminate Her Life Insurance Benefit.

In 1980 Lehigh Valley cancelled a life insurance benefit under the Defined Benefit Plan for Mrs. Haberern while simultaneously tripling all other participants' life insurance benefits. (App. 46a). Mrs. Haberern never received any notification of the amendment concerning the life insurance, signed and approved by trustee McDonald. (App. 46a). Because the District Court found the employer's stated reason for this change, i.e., to save money, "unworthy of belief," (App. 60a), the court held that Lehigh Valley had the discriminatory intent of inter-

fering with Mrs. Haberern's benefits in violation of ERISA § 510, 29 U.S.C. § 1140, by discriminatorily amending the Defined Benefit Plan.

B. The Appellate Decision

1. The Court of Appeals Found the Fraudulent Inducement of Mrs. Haberern to Participate in the Pension Plan and the Diversion of Her Salary To Fund the Employer-Funded Plan Was "Managerial in Character" and Thus Completely Unrestricted by ERISA.

A panel of the United States Court of Appeals for the Third Circuit reversed the District Court's conclusion that the Pension Plan fiduciaries breached their fiduciary duty. The panel adopted the position that ERISA does not preempt an employer's rights under Pennsylvania's at-will employment doctrine and concluded that the fiduciaries' decision to fraudulently induce Mrs. Haberern to participate in the Defined Benefit Plan and to divert her salary to fund the employer-funded pension plan was "managerial in character" and thus unrestricted by ERISA. "The fact that this decision may not have been in Haberern's interest makes no difference. . . . [U]nder Pennsylvania law they had the right to decrease her compensation whether or not they had established a benefits plan. Therefore Haberern's only remedy if she had been unwilling to continue her employment for the compensation offered was to resign." (App. 16a).

2. Approval of the Discriminatory Pension Plan Amendment

Accepting the District Court's finding that Lehigh Valley had acted with discriminatory intent, the appellate panel nonetheless reversed the District Court's holding. The panel held that ERISA § 510 does not apply because, while ERISA prohibits discrimination interfering with plan rights, it does not prohibit discriminatory plan amendments. (App. 22a-26a).

BASIS FOR THE DISTRICT COURT'S JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this matter pursuant to ERISA § 502(e)-(f), 29 U.S.C. § 1132(e)-(f).

ARGUMENT

The facts in this case are too typical: an older woman works as a secretary-bookkeeper for a small professional office — doctors, dentists, or lawyers — and the professionals attempt to run the pension plan to obtain the largest possible benefits for themselves. The appellate panel's decision is fundamentally flawed because it places the burden of deciphering in which role a employer/pension plan sponsor/ pension plan administrator/ pension plan trustee may be acting at any given moment squarely on the employee — the person with the least information. This duty to decipher becomes particularly onerous, if not impossible, when the employer/fiduciary engages in an ongoing course of conduct aimed at defrauding that employee.

While this is but one case of a lone retired employee in a small professional practice setting, the appellate panel's decision sets a disastrous precedent for every working man and woman in this country by jeopardizing all working persons' rights under ERISA-protected pension plans by (a) allowing pension plan fiduciaries, under their alternative guise as "employers," to defraud pension plan participants with impunity, and (b) allowing employers, under the pretext of "plan amendments," to discriminate against pension plan participants. Petitioner Ruth Haberern respectfully requests this Court to review the appellate panel's decision because of its far-reaching and detrimental consequences for this nation's pension participants.

I. The Appellate Panel's Decision Artificially Restricts a Person's Fiduciary Status Under ERISA When That Person Is Engaged in a Course of Conduct Related to the Management of a Pension Plan.

A. ERISA Was Enacted to Address Corruptly Mismanaged Pension Plans and the Scope of Its Pre-emption Is Broad.

Congress, concerned that many pensions were being corruptly mismanaged and that American workers were losing their financial security in retirement as a result, enacted ERISA,

> declaring it to be the policy of the statute to protect the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect to the plans, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Mertens v. Hewitt Assocs., 113 S. Ct. 2063, 2072 (1993)(White, J., with whom C.J. Rehnquist, J. Stevens and J. O'Connor joined, dissenting).

ERISA's "pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA." FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990). Further, ERISA's pre-emption extends beyond state laws specifically designed to affect only employee benefit plans. Id. at 58-59. This Court has held that "to interpret the pre-emption clause to apply only to state laws dealing with the subject matters covered by ERISA, such as reporting, disclosure, and fiduciary duties, would be incompatible with the provision's legislative history...." Id. at 58.

B. ERISA Defines "Fiduciary" in Functional Terms of Control and Authority Over a Plan.

ERISA provides that "a person is a fiduciary with respect to a plan to the extent he exercises any discretionary authority or discretionary control respecting management of such plan...." 29 U.S.C. § 1002(21)(A). ERISA also provides that not only the persons named as fiduciaries by a benefit plan, "but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets, is an ERISA 'fiduciary.'" Mertens, 113 S. Ct. at 2066 (majority opinion).

The inclusion of the phrase "to the extent" in 29 U.S.C. § 1002(21)(A) means that a party is a fiduciary only as to the activities which bring the person within the definition. "[A] court must ask whether a person is a fiduciary with respect to the particular activity at issue." Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 61 (4th Cir. 1992), cert. denied, 113 S. Ct. 1051 (1993). See, e.g., 29 C.F.R. § 2509.75-8 (1991); Licensed Div. Dist. No. 1 MEBA/NMU v. Defries, 943 F.2d 474, 477-78 (4th Cir. 1991) cert. denied, 112 S. Ct. 972 (1992); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1158 (3d Cir. 1990); United Mine Workers of Am. v. Powhatan Fuel, Inc., 828 F.2d 710, 714 (11th Cir. 1987); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1459-60 (5th Cir. 1986); Leigh v. Engle, 727 F.2d 113, 133-35 (7th Cir. 1984).

The appellate panel failed to determine the employer/fiduciary's status with respect to the particular activity at issue here, i.e. scheme to institute and operate a pension plan by defrauding Mrs. Haberern. Instead, because the party was also an "employer", the panel broadly applied the at-will employment doctrine to render ERISA meaningless. The appellate panel's method of determining a party's fiduciary status under ERISA flies in the face of the statute and sets an ominous precedent for all pension participants.

ERISA "abounds with the language and terminology of trust law" and must be construed against the background of the common law of trusts, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989), and "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." Mertens, 113 S. Ct. at 2071.

ERISA defines "fiduciary" "not in terms of formal trusteeship, but in functional terms of control and authority over the plan, thus expanding the universe of person subject to fiduciary duties — and to damages — under § 409(a).... Professional service providers such as actuaries become liable for damages when they cross the line from advisor to fiduciary." Mertens, 113 S. Ct. at 2071 (emphasis in original). ERISA assigns fiduciaries a number of detailed duties and responsibilities, which include "the proper management, administration,

and investment of fund assets . . . the disclosure of specified information, and the avoidance of conflicts of interest." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142-43 (1985); see 29 U.S.C. §§ 1104(a), 1105(a)("knowing participation" liability imposed on co-fiduciaries); see also Eddy v. Colonial Life Ins. Co. of America, 919 F.2d 747, 750 (D.C. Cir. 1990).

Equitable trust principles make plain that a company should not benefit from its misrepresentations, and courts have imposed fiduciary duties on employers for eve-of plan misrepresentations made by the employer. Elmore v. Cone Mills Corp., 23 F.3d 855, 875 (4th Cir. 1994). See Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154, 1164 (6th Cir. 1988)(once a "fiduciary does communicate with potential plan participants after serious consideration has been given [to the plan], then any material misrepresentations may constitute a breach of their fiduciary duties"). See also Eddy v. Colonial Life Ins. Co. of America, 919 F.2d 747, 750 (D.C. Cir. 1990)("[A] fiduciary bears an affirmative duty to inform a beneficiary of the fiduciary's knowledge of prejudicial acts by an employer — such as the failure of an employer to contribute to a fund as required.")

C. The Appellate Panel's Decision Artificially Restricts a Person's Fiduciary Status Under ERISA When That Person Is Engaged in a Course of Conduct Related to the Management of a Pension Plan.

The appellate panel failed to recognize that the employer/fiduciaries' activities went beyond a mere "design" or description of the plan as it existed but included a course of fraudulent conduct in establishing and maintaining the plan, including misrepresentations that her participation in the plan was mandatory, that she was required to fund her contribution to the plan, and that she would receive a pension equal to her salary.

What is remarkable about the appellate panel's decision is its evisceration of ERISA's principles and protections by categorically declaring that Pennsylvania's at-will employment doctrine immunizes an

employer's activities — no matter how fraudulent the scheme — related to the creation (and administration) of the pension plan. The appellate panel ignored the district court's finding of the fiduciaries' continuing course of fraudulent conduct as to how they instituted the plan; thus, the panel erroneously concluded that because the fiduciaries' conduct supposedly related to merely designing the plan, and not to administering the plan, then ERISA did not provide a remedy in this pension case.

Appellate courts have ruled that ERISA fiduciaries who function in other roles, such as employers or company officials, are permitted to "wear two hats," as "employers" and as "fiduciaries." Belade v. ITT Corp., 909 F.2d 736, 738 (2d Cir. 1990). Persons assume fiduciary status only when and to the extent that they function in their capacity as plan administrators or trustees. Id.; 29 U.S.C. § 1002(21)(A). In designing a plan, an employer is unconstrained by fiduciary responsibilities. Nazay v. Miller 949 F.2d 1323, 1329 (3d Cir. 1991); Trenton v. Scott Paper Co., 832 F.2d 806, 808-09 (3d Cir. 1987), cert. denied, 485 U.S. 1022 (1988). No one disputes Lehigh Valley's and McDonald's right to design the Defined Benefit Plan as they saw fit. It was their unfettered choice to design a voluntary plan in which the employer made the contributions.

At the trial, Mrs. Haberern testified in detail that the two doctors told her that her salary would be used to fund the newly created Defined Benefit Plan. (App. 124a). John Lisicky, Lehigh Valley's accountant who testified on behalf of Mrs. Haberern, also testified in detail that the two doctors decided to use Mrs. Haberern's compensation to fund her Defined Pension Benefit precisely because they didn't want to fund the required amount — despite the express terms of the Plan. (App. 128a-130a).

The trustees/employer/plan administrator's scheme to defraud Mrs. Haberern directly related to their ongoing administration of the pension plan. Thus, the district court properly found that Lehigh Valley and McDonald were functioning as "fiduciaries" and had breached their fiduciary duties under ERISA.

In administering a plan, an employer and plan fiduciaries are bound to fulfill their fiduciary duties. Nazay, 832 F.2d at 1329. And in this case, Lehigh Valley and McDonald engaged in a continuing course of fraudulent conduct — by using Mrs. Haberern's salary to fund the plan and by concealing from her that her participation was voluntary. In so doing, they unabashedly wore a "third hat": self-interest. And by so doing, they violated their fiduciary duties. Their ongoing conduct was in furtherance of their scheme to defraud Mrs. Haberern and their management and administration of the pension plan. Their deception of Mrs. Haberern and their management of the plan are inseparable.

II. Mrs. Haberern's Employment-At-Will Status Did Not Entitle Lehigh Valley To Violate the Explicit Terms of the Pension Plan or ERISA.

The appellate panel also adopted the position that Lehigh Valley had an unfettered right to divert Mrs. Haberern's salary to fund her pension — in direct violation of the Plan's terms — because her status as an at-will employee allowed Lehigh Valley "to decrease her compensation whether or not they had established a benefits plan." (App. 16a).

The panel's conclusion that the at-will employment doctrine shields an employer/fiduciary against its obligations under ERISA — and the explicit terms of a pension plan — is erroneous because ERISA pre-empts any state law relating to the protection of employee pension benefits, including use of the at-will employment doctrine as a defense to violating a pension plan's explicit terms. 29 U.S.C. § 1144(a). An employer cannot defraud an employee by using the employee's salary to avoid the employer's obligation to contribute to the employer funded pension plan.

In Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990), the employer claimed it could terminate an at-will employee for any reason, regardless of ERISA, because the state law employment at-will doctrine was controlling. This Court held that ERISA pre-empted state law regarding wrongful discharge, stating:

> We have no difficulty in concluding that the cause of action which the Texas Supreme Court recognized here — a claim that the employer wrongfully terminated plaintiff primarily because of the employer's desire to avoid contributing to or paying benefits under the employee's pension fund — 'relates to' an ERISA-covered plan within the meaning of §514(a) [29 U.S.C. § 1144(a)] and is therefore pre-empted.

498 U.S at 140.

Similarly, the appellate panel's determination that Pennsylvania's at-will employment law broadly prevails over ERISA and exonerates their violation of the explicit terms of the Plan, as well as their fiduciary duties under ERISA, ignores ERISA's broad pre-emption provision.

A. Using An Employee-At-Will's Salary to Fund Her Pension, In Direct Violation of the Plan's Terms, Violates Public Policy.

The appellate panel's decision turns the phrase "pension benefits" on its head. Typically, a benefit is added to one's compensation. As the plan's actuary who testified on behalf of the defendants freely admitted at the trial, no employee in her right mind would turn down such a "benefit" because all the money was coming from the employer. (Riley Test. at App. 131a).

In Mrs. Haberern's situation, however, because two highly compensated doctors wanted to shelter their excess income, because they needed a certain percentage of the employees to be participants in the Defined Benefit Pension Plan for it to take effect, and because the doctors were unwilling to spend about an additional $4,500 to fund Mrs. Haberern's pension, the doctors forced Mrs. Haberern to take a severe reduction in her salary to fund a pension benefit plan that she did not want or need. (Haberern Test. at App. 124a). It is pure sophistry in this case to assert, as the Court of Appeals panel did, that the plan fiduciaries fulfilled the requirement that the employer fund the plan because the dollars came from the employer. From the point of

view of the employee who was in one year making $18,358 but in the next, instead of getting her usual raise, making about $14,429, it is she, not the employer, who is funding the plan. Moreover, the uncontradicted testimony shows that the plan fiduciaries decided to have Mrs. Haberern fund the plan and so stated to both their accountant and Mrs. Haberern. Thus, the district court's finding is not only entitled to deference, but indeed must be treated as conclusive because there is nothing in the record to contradict that fact.

The fiduciaries' calculated abuse of an elderly employee — merely to further their financial self-interest — is shocking. Far more important, unless the Court of Appeal's decision is reversed, employees across the country may be defrauded and have their salaries slashed in the name of "employer" funded pension "benefits."

B. The Panel's Decision Ignores the Crucial Finding of Fact That the Fiduciaries Misled Mrs. Haberern About the Pension Plan.

In the name of defending the inalienable right of employers to treat at-will employees in a completely untrammeled way, the panel ignored the crucial fact that the pension plan fiduciaries lied to Mrs. Haberern that her participation in the pension plan was mandatory when, in fact, it was voluntary.

The fact that two doctors — who were the pension plan's trustees and the sole shareholders in Lehigh Valley, the plan administrator and sponsor — affirmatively misled Mrs. Haberern, despite her protests, was never contradicted.

The appellate panel concluded that, although the plan fiduciaries affirmatively misled Mrs. Haberern, this 57-year-old woman's only remedy, if she did not like the arrangements, was to quit. (App. 16a). In reaching this remarkable conclusion the panel ignored substantial, uncontradicted evidence about the pernicious effects of the fraud on Mrs. Haberern.

On cross-examination, Mrs. Haberern testified as follows:

Q: At that point in time you knew that going forward from 1979 or 1980, whenever that discussion was, that your compensation arrangement with the corporation was changing?

Mrs. Haberern: Yes, I did.

Q: All right. And you continued to work there?

Mrs. Haberern: Oh, absolutely because I was told that, excuse me, I was told that they were going to fund the defined benefit plan as I said so many times and that when I retired, I would get a pension equal to my salary. That is the one and only reason I stayed, I wouldn't take a big percentage loss and continue to work for them.

(App. 126a).

Mrs. Haberern's testimony was not challenged. The uncontradicted evidence is that the employer/fiduciaries' scheme succeeded: their affirmative misrepresentations specifically induced Mrs. Haberern to continue working for her employer. The panel's decision, nonetheless, side-stepped that devastating fact. Because the panel ignored the fraud committed on Mrs. Haberern, the panel's decision directly conflicts with ERISA and all pertinent case law.

The evidence is clear: the wrongdoers, who were pension plan fiduciaries, affirmatively misled Mrs. Haberern specifically to force her into the pension plan. The panel's approval of pension fiduciaries affirmatively misleading pension participants results in a decision that directly conflicts with ERISA, Supreme Court and Third Circuit case

law, and jeopardizes the rights of all pension participants. See ERISA §§ 2(b)[5] and 404(a)[6]; NLRB v. Amax Coal Co., 453 U.S. 322, 329-34 (1981)(sole obligation of pension plan trustees is to protect the interests of beneficiaries, regardless of the effect on employer).

This Court should accept review of the appellate panel's decision to prevent a clear injustice and violation of ERISA, not only for Mrs. Haberern, but for all other pension participants who may find themselves similarly at the mercy of employers who cavalierly ignore their obligations to fund pensions by duplicitously reducing employee salaries.

III. The Panel's Approval of a Discriminatory Pension Plan Amendment Is Contrary to ERISA.

The District Court, applying Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir.), cert. denied, 484 U.S. 979 (1987), held that Lehigh Valley had the discriminatory intent of interfering with Mrs. Haberern's benefits in violation of ERISA § 510, 29 U.S.C. § 1140, by amending its pension plan to eliminate only Mrs. Haberern's life insurance benefit while tripling this benefit for all other plan participants. Accepting Lehigh Valley's discriminatory intent, the panel nonetheless reversed the district court's holding. The panel, relying on McGath v. Auto-Body North Shore, Inc., 7 F.3d 665 (7th Cir. 1993), held that ERISA § 510 does not apply because, while ERISA prohibits discrimi-

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5. ERISA § 2(b), 29 U.S.C. § 1001(b), provides:

It is hereby declared to be the policy of this chapter to protect ... the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

6. ERISA § 404(a), 29 U.S.C. § 1104(a), provides in part, "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."

nation interfering with plan rights, it does not prohibit discriminatory plan amendments. (App. 24a-26a).

ERISA § 510, 29 U.S.C. § 1140, prohibits employers from discriminating against employees for the purpose of interfering with certain benefits to which they are or may become entitled. Section 510 provides in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140.

To prove a prima facie case under ERISA § 510, an employee must demonstrate: (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee is or may become entitled. Gavalik, 812 F.2d at 852. Once the plaintiff proves a prima facie case, the employer must present a legitimate nondiscriminatory reason for the change such as cost-savings. If the employer presents such a reason, the employee must show that the employer's asserted reason is pretextual. Id. at 851-53.

Plaintiff makes a prima facie case in a plan amendment case if the plaintiff can show that (1) at the time a plan amendment was instituted, plaintiff was the only person affected by the amendment, (2) defendants intended that the plaintiff would be affected by the amendment, and (3) a plan amendment changed a benefit to which the plaintiff was or would have become entitled. There is no basis in ERISA for limiting § 510 actions to only those which seek "pension benefits." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990). Prohib-

iting discriminatory interference with plan rights but permitting discriminatory amendments to a plan is a distinction without a difference.[7]

The appellate panel's decision, and the McGath decision on which it relied, too narrowly construe the protections of ERISA § 510. ERISA § 510 is based upon the language of § 8(a)(3) of the National Labor Relations Act (NLRA).[8] West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980). While both NLRA § 8(a)(3) and ERISA § 510 apply to the "employment relationship," the appellate panel construed "employment relationship" much too narrowly. This Court, in Radio Officers' Union v. NLRB, 347 U.S. 17, 39-42, 46 (1954), made it clear that § 8(a)(3) cover not only hiring, firing, transferring, promotion and discharge, but the granting of wage increases and the withholding of benefits. In applying this Court's interpretation of the words of NLRA § 8(a)(3) to the identical words in ERISA § 510, § 510 must also include protection against not only discrimination in hiring, firing, promotion, and transferring, but also against discrimination in other terms and conditions of employment, including wages and benefits. See generally Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)(where two statutes share a common purpose, the language of one section is in haec verba with the other, and the legislative history of one section indicates that the source was the other section, the construction of the more recent section should follow the other).

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7. Three Circuit Courts have reviewed the applicability of § 510 to plan amendments. The Eleventh and Fifth Circuits in Owens v. Storehouse, Inc., 984 F.2d 394 (11th Cir. 1993) and McGann v. H&H Music Co., 946 F.2d 401 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992), ruled in favor of the employers because discrimination was lacking, i.e., the employer had legitimate cost-saving reasons. As discussed infra at p. 19, the Seventh Circuit's recent decision in McGath v. Auto-Body North Shore, Inc., 7 F.3d 665 (7th Cir. 1993) misconstrued the National Labor Relations Act and the protections of ERISA § 510.

8. Section 8(a)(3) of the NLRA provides in pertinent part that "it shall be an unfair labor practice for an employer . . . [to] discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

Moreover, the appellate panel's decision that ERISA § 510 does not protect an employee when her employer amends a pension benefit plan, but protects an employee when she is terminated or otherwise disciplined leads to an anomalous result. Under this restrictive view, while § 510 protects an employee from losing her job if the loss resulted from a discriminatory motive to reduce or eliminate the employee's benefits, it does not protect the same employee when the same discriminatory motive results in a loss or reduction of the same benefits under the pretext of a plan amendment. The appellate panel's position permits an employer to do indirectly by plan amendment what it cannot do directly by termination, and ultimately exposes all pension plan participants in this country to the threat of unjust discrimination under the facade of plan "amendments."

CONCLUSION

Petitioner Ruth Haberern respectfully petitions this Court for a writ of certiorari to review the appellate panel's decision. This Court should review the decision because of its far-reaching and detrimental consequences for this nation's pension participants. The decision artificially restricts a person's fiduciary status under ERISA and improperly places the burden of deciphering in which role a employer/fiduciary may be acting at any given moment, upon an employee — the person with the least information. Furthermore, this duty to decipher is particularly unfair, if not impossible, when the employer/fiduciary engages in an ongoing course of conduct aimed at defrauding that employee.

The appellate panel's decision that ERISA prohibits discriminatory interference with plan rights but permits discriminatory plan amendments is a distinction without a difference. The appellate panel's position permits an employer to do indirectly by plan amendment what

it cannot do directly by termination, and ultimately exposes all pension plan participants in this country to the threat of unjust discrimination under the facade of plan "amendments."

Respectfully submitted,

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